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IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

CITY COUNCIL OF THE CITY OF CHICAGO,

Petitioner,

v.

MARS KETCHUM, et al.,

Respondents,

and

CHARMAINE VELASCO, et al.,

Respondents,

and

POLITICAL ACTION CONFERENCE OF ILLINOIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United
States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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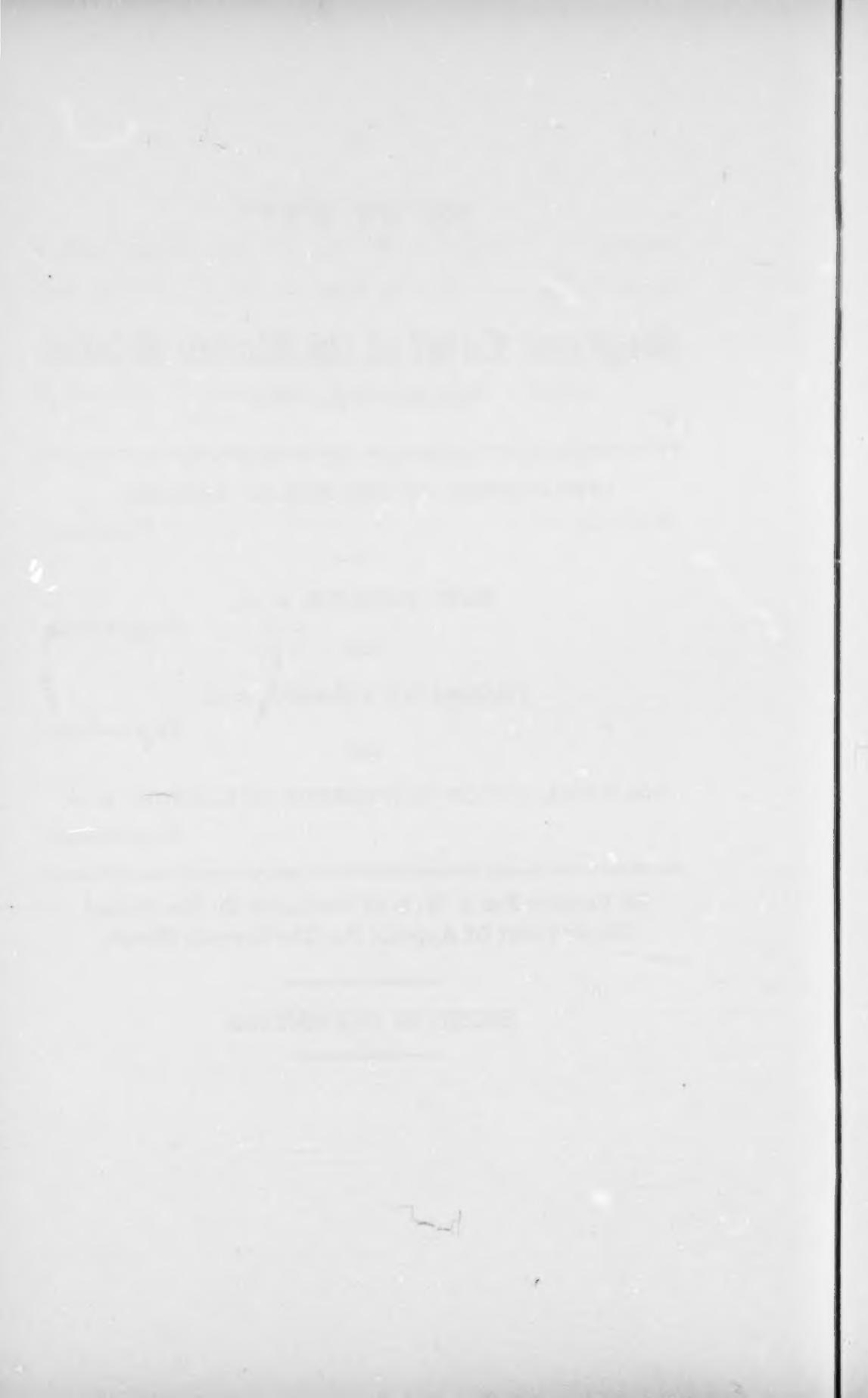
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BRIEF IN OPPOSITION



INTRODUCTION

The petition for a writ of certiorari omits many relevant facts and seriously distorts the ruling of the court of appeals. Review of the oral decision of the district court, the decision of the court of appeals, and the factual background of what petitioner concedes on appeal was an illegal redistricting reveals that no issues warranting certiorari jurisdiction are present in this case.

After setting forth an accurate account of the factual background of this voting rights case, respondents demonstrate that the petition raises no issue worthy of this Court's attention.

STATEMENT OF THE CASE

A. The 1981 Redistricting.

The 1980 national census reflected dramatic demographic changes in the City of Chicago. Between 1970 and 1980, the number of black and Hispanic persons in Chicago increased significantly while the number of white persons decreased. In 1970, whites comprised 65.5%, blacks comprised 32.7%, and Hispanics comprised 7.3% of the total population of Chicago. (PX 145.*) By 1980, whites were 43.2%, blacks were 39.8%, and Hispanics were 14.0% of the total population of Chicago. (PX 145.)

* The following abbreviations will be used in referring to the record: "Pet." and "Pet. App." for the Petition and its separately bound Appendix, respectively; "Tr." for references to the district court record; "Stip." for stipulations entered in the district court; "PX" and "DX" for plaintiffs' and defendants' exhibits, respectively.

In 1970, under the 1970 ward map, whites were in the majority in 35 wards and blacks were in the majority in 15 wards. (PX 157.) By 1980, under the 1970 ward map boundaries, whites were in the majority in 22 wards, blacks were in the majority in 19 wards, and Hispanics were in the majority in four wards. (Stip. ¶ 62.)

Illinois law required the City Council of the City of Chicago (the "City Council") to redistrict the City by December 1, 1981 to equalize the population of its fifty wards. (Ill. Rev. Stat. ch. 24 §§ 21-36 & 21-38.) On November 30, 1981, the City Council adopted a new ward map (Stip. ¶ 104), hereinafter referred to as the "City Council map" (PX 9).

Under the City Council map, the number of white majority wards increased to 24 and the number of black majority wards decreased to 17. The City Council map provided four wards with Hispanic majorities and five wards in which no one group comprised a majority of the total population. (Stip. ¶ 106.) More significantly, when viewed in terms of voting-age population, the number of white majority wards provided by the City Council map increased still further to 28 wards. (PX 158.) The number of black majority wards remained at 17. (PX 158.) The number of Hispanic wards decreased to two and there were three wards in which no one group comprised a majority. (PX 158.)

B. Challenge to the 1981 Redistricting.

In the summer of 1982, a group of nine black voters (the *Ketchum* plaintiffs), a group of six Hispanic voters (the *Velasco* plaintiffs) and a group of four individuals and a black political organization (the *PACI* plaintiffs) filed voting rights complaints against the City Council and other individual defendants. The three suits were consolidated and the United States, by and through the

Department of Justice, was granted leave to intervene as an additional plaintiff. The consolidated cases were tried before the Honorable Thomas R. McMillen of the United States District Court for the Northern District of Illinois in late 1982. A summary of the evidence presented by the plaintiffs to establish that the City Council map violated Section 2 of the Voting Rights Act follows.

The evidence demonstrated that the City Council's map diluted minority voting strength in several ways: (1) the manipulation of boundaries to protect white incumbents, maximize white voting strength, and minimize minority voting strength; (2) "fracturing" (rendering groups of blacks and Hispanics politically ineffective by splitting them and placing each portion into a white majority ward); (3) "packing" (the wasting of black votes through unnecessary concentrations of black population); and (4) "retrogression" (the reduction of the previously attained voting strength of a minority group).

1. Manipulation of Ward Boundaries.

The City Council map manipulated ward boundaries to protect white incumbents in wards that had become predominantly black or Hispanic, to maximize white voting strength, and to minimize minority voting strength city-wide. Although whites represented only 3% more of the total population than blacks, the City Council map provided for seven more white majority wards than black majority wards. (PX 142.) When voting-age population was considered, there were eleven more white majority wards than black majority wards under the City Council map. (PX 153.) Hispanics, who represent 14% of the total population (PX 145), were given majorities in only 8% of the wards under the City Council map (PX 142). When voting-age population was considered, Hispanics had majorities in only 4% of the wards. (PX 158.)

The City Council map also manipulated boundaries to protect white incumbents and minimize minority voting strength in particular wards. In the process of reducing the population in certain over-populated black majority wards to comply with the one person-one vote standard, a large number of black persons were removed from the wards. At the same time, a large number of white persons were added to these wards, reducing or eliminating the black majorities therein and preserving the wards for the white incumbents.

For example, to comply with one person-one vote requirements it was necessary to reduce the population in the 37th ward from 77,342 to somewhere near the ideal population of 60,101. To accomplish this goal of reducing the 37th ward's population by approximately 17,000 persons, the City Council map removed approximately 38,800 blacks from the 37th ward and added approximately 16,550 whites to that ward, thereby changing a 76.4% black majority into a 44.0% white plurality. (PX 266.) The white incumbent was thereby protected. A similar result was achieved in several other black majority wards. The following table demonstrates the dramatic manipulation of population and the results thereof (PX 266):

Ward	Old Map		Total		New Map	
	Total	(% Black)	Out	(% Black)	Total	(% Black)
7	69,521	(62.6)	17,759	(82.2)	8,144	(74.4)
15	72,255	(66.4)	23,730	(96.7)	11,441	(0.0)
18	61,409	(49.3)	6,886	(98.7)	5,139	(81.4)
37	77,342	(76.4)	40,368	(96.1)	23,330	(8.2)

Hispanic majorities also were reduced or eliminated in the process of drafting the City Council map. The first draft map presented to the aldermen contained five Hispanic majority wards, the largest of which were the 22nd ward (72.87%) and the 33rd ward (59.52%). (PX 139.) After a series of meetings with the incumbent white aldermen (Tr. 259-62, 269), the City Council reduced the Hispanic population of the 22nd ward to 64.88% and the Hispanic population of the 33rd ward to 31.46% (PX 142).

2. Fracturing.

Although the Chicago South Side black community contains ample population for 15 to 16 wards with black majorities in excess of 70%, the City Council map produced only 13 black majority wards on the South Side. (PX 214-17.) Thirteen wards were the minimum number of black majority wards that could have been created there. (Tr. 1047.) This result was achieved by splitting off substantial amounts of black population from the edge of the cohesive black community and placing these blacks in the following neighboring wards (PX 142):

<u>Ward</u>	<u>Black Population</u>	<u>Black % of Total Population</u>
10	16,363	27.2
11	12,491	20.8
14	15,293	25.5
15	25,000	41.7
18	27,667	46.4
19	8,765	14.7

In each of these six wards, whites held a majority of the voting-age population. (PX 153.)

The same pattern of fracturing occurred in the West Side black community, which had ample population for five to six wards with black majorities in excess of 75%. (PX 214-15.) The City Council map provided only four black majority wards on the West Side (PX 216) because substantial portions of the cohesive black community were split off and placed in surrounding wards. Portions of the black community were placed in the following neighboring wards (PX 142):

<u>Ward</u>	<u>Black Population</u>	<u>Black % of Total Population</u>
1	19,190	38.4
22	4,425	20.1
25	15,472	27.0
37	22,213	36.8

Fracturing decimated Hispanic voting strength on the Near Northwest Side. The Hispanic population was divided among six wards that radiate outward from the heart of this predominantly Puerto Rican community. (PX 4.) As a result, Hispanics comprise a slight majority of total population in only two of the six wards and a slight majority in voting-age population in only one of the wards (PX 142, 153):

<u>Ward</u>	<u>Hispanic Population</u>	<u>Hispanic % of Total Population</u>	<u>Hispanic % of Voting Age Population</u>
26	31,768	52.3	43.7
30	14,443	24.1	19.1
31	34,481	57.3	52.4
32	28,315	47.2	39.6
33	21,379	35.5	29.4
35	18,890	31.5	25.8

The two predominantly Mexican-American communities on the Near Southwest Side were also fractured. The geographically and culturally cohesive Hispanic neighborhood of Pilsen was split between the 1st ward (which became 30.7% Hispanic) and the 25th ward (which was left with a bare Hispanic majority of 52.6%). (PX 4, 142.) Similarly, a substantial portion of the neighborhood of Little Village, which had been entirely within the 22nd ward under the 1970 map (PX 4), was placed in the 12th ward (PX 9). Under the City Council map, the 12th ward was 32.0% Hispanic and the 22nd ward was 64.8% Hispanic. (PX 142.) If voting-age population is considered instead of total population, the remaining Hispanic majorities were eliminated or severely reduced. (PX 153.)

Although the black and Hispanic communities were extensively fractured under the City Council map, there was no comparable treatment of whites. (PX 4.) Statistical analyses performed by noted University of Chicago sociologist Dr. Philip Hauser demonstrated that, whereas

15.4% of all blacks were placed into wards with a white voting-age majority, only 3.9% of all whites ended up in wards with a black voting-age majority. (PX 165.) Similarly, only 1.6% of all whites were placed in wards with a Hispanic voting-age majority while 58.2% of all Hispanics were placed in wards with white voting-age majorities. (PX 168.) The probability of a black being placed in a ward with a white voting-age majority, therefore, was 4.47 times greater than the probability of a white being placed in a ward with a black voting-age majority. (PX 171.) The probability of a Hispanic being placed in a ward with a white voting-age majority was 88.68 times greater than the probability of a white being placed in a ward with a Hispanic voting-age majority. (PX 172.)

These differences become even more pronounced when one focuses on the 20 wards that crossed an imaginary line encircling all contiguous majority black and/or Hispanic census tracts. (PX 164.) According to Dr. Hauser, these border-crossing wards are significant because the physical proximity of the minority population groups puts them at greater risk of being manipulated to strengthen or dilute votes. (Tr. 731.) Only 2.0% of whites in border-crossing wards were in wards with a black voting-age majority and 1.7% of whites in border-crossing wards were in wards with a Hispanic voting-age majority, while 44.4% of blacks and 56.0% of Hispanics in border-crossing wards were placed in wards with a white voting-age majority. (PX 167, 170.) In border-crossing wards, therefore, blacks were 33.67 times as likely to be placed in white majority wards as whites were to be placed in black majority wards. (PX 171.)

3. Packing.

Under the City Council map, the black population exceeded 89% in 14 of the 17 wards in which blacks were

a majority of the total population. (PX 142.) There were only six wards in which whites were 89% or more of the total population. (PX 142.)

4. Retrogression.

Retrogression is gauged by comparing the voting strength of blacks and Hispanics under the 1970 ward map and the City Council map using the 1980 census figures. (Tr. 700, 1070.) The City Council map was retrogressive on a citywide basis because it provided only 17 wards with black majorities. (Stip. ¶ 106.) Prior to the adoption of the City Council map, blacks were in the majority in 19 wards. (Stip. ¶ 62.)

In addition to this citywide retrogression, there was retrogression of minority voting strength within particular wards under the City Council map. The 7th, 15th, 18th, and 37th wards had been white majority wards in 1970 and had become black majority or plurality wards by 1980. (PX 41, 137.) The black population in each of these wards was severely reduced under the City Council map (PX 137, 142):

<u>Ward</u>	<u>1980 Old Wards</u>	<u>1980 New Wards</u>
7	62.6%	58.4%
15	66.4%	41.7%
18	49.3%	46.4%
37	76.4%	36.8%

5. Other Factors.

The legislative history of the 1982 amendments to Section 2 of the Voting Rights Act, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1982)), enumerates several additional factors that typify voting rights violations. (S. Rep. No. 97-417, 97th Cong., 2d Sess. at

28-29, reprinted in 1982 U.S. Code Cong. & Ad. News 206-07.) These are the so-called *Zimmer-White* factors. Plaintiffs' evidence established the existence of racially polarized voting (Stip. ¶¶ 113-16; Tr. 1747-48, 1753; PX 227); historical discrimination in electoral matters (Tr. 1311-31); racial discrimination in areas such as housing, education, and employment (Tr. 1317-18, 1323-24, 3336-37); a lack of access by minorities to the candidate slating process (Tr. 553, 2206, 2688-90); and a lack of responsiveness on the part of elected officials to the particularized needs of minorities (Tr. 1430-34, 1579).

6. Alternative Maps.

Plaintiffs demonstrated that the City Council could have adopted a redistricting plan that did not manipulate existing boundaries to preserve white incumbencies or result in the fracturing, packing, and retrogression described above. Plaintiffs presented three alternative maps (PX 32a, 33a, 218) that remedied the fracturing of black and Hispanic communities, the packing of the black community, and the retrogression both citywide and within particular wards, all without diluting white voting strength. The alternative maps provided 23 or 24 white majority wards, 20 to 22 black majority wards, and five Hispanic majority wards. (PX 146-48.)

The alternative maps provided minority populations of 65% or more in each of the black majority wards. (PX 146-48.) During the trial, witnesses for both sides testified that 65% of total population is a widely recognized and accepted guideline for minority populations in redistricting. (Tr. 2202-04, 3665-66.) That figure is derived from adding 15% to a simple 50% majority of total population: 5% each for the lower percentage of residents of voting age, registration patterns, and turnout of minorities. (Tr.

3665.) The City Council's own expert, Kimball Brace, stated that, on the average, Hispanics in Chicago needed to comprise 70% to 74% of total population to have a meaningful opportunity to elect candidates of their choice. (Tr. 3817.)

C. Ruling of the District Court.

As petitioner notes, the trial was conducted over a period of several weeks and produced a voluminous record of testimony and exhibits. (Pet. 2.) Notwithstanding the complexity of this case, prior to issuing its oral opinion the district court declined to accept written proposed findings of fact and conclusions of law. (Tr. 3295-99.) Thereafter the district court failed to issue any written findings of its own.

Instead, on December 21, 1982, the district court rendered an unfocused and confusing oral opinion ultimately concluding that the City Council map violated Section 2 of the Voting Rights Act in its treatment of black and Hispanic voters. (Pet. App. 43-68.) The court's oral statements evidenced a profound misunderstanding of the Voting Rights Act and of the principles relating to vote dilution. During the course of the trial the court repeatedly questioned the applicability of Section 2 to redistricting cases (*e.g.*, Tr. 2384-85, 2413); in its oral decision, the district court further opined (incorrectly) that the legislative history of Section 2 "said nothing about redistricting or diluting the vote of minorities." (Pet. App. 53.)

The district court applied an unfounded theory of Section 2, declaring that Section 2 was violated only by defects in the redistricting plan as a whole. (Pet. App. 54, 56.) The district court rejected evidence of fracturing and packing as irrelevant. The court deemed fracturing and packing to be inevitable in light of the growth of

black and Hispanic populations. (Pet. App. 58-59.) Moreover, the district court deemed fracturing and packing to be excusable to allow white aldermen to save their incumbencies. (Pet. App. 58-59.) The district court also refused to consider retrogression within particular wards. (Pet. App. 71.) Thus, the sole basis for the district court's finding of a violation of Section 2 was the citywide retrogression based on a comparison of the number of black and Hispanic majority wards before redistricting and after redistricting. (Pet. App. 59-66.)

Upon finding a Section 2 violation, the district court turned its attention to the fashioning of a remedy. The court stated that a simple majority of voting-age population is the only criterion to be used in determining whether a minority group has a reasonable opportunity to elect a candidate of its choice. (Pet. App. 61, 63.) The district court directed the City Council's lawyers to revise the City Council map to create a simple majority of black voting-age population in two wards, a simple majority of Hispanic voting-age population in three wards, and a plurality of Hispanic voting-age population in another ward. (Pet. App. 62-68.) The district court also directed the City Council's lawyers to provide a 55% Hispanic voting-age population in another ward, noting that the increased percentage was necessary because the ward contained a large number of Mexicans who were not citizens and therefore unable to vote. (Pet. App. 65.)

Two days after the district court rendered its oral opinion on liability, the City Council's lawyers presented a revised map. The revised map was not adopted by the City Council nor was it in any way a by-product of the legislative process. The black and Hispanic plaintiffs and the Department of Justice objected to the revised map on the ground that it failed to remedy adequately the

significant deprivation of voting rights suffered by black and Hispanic voters. (Pet. App. 83-105.) The plaintiffs also objected to the adoption of the revised map without an evidentiary hearing establishing how it was prepared and whether it cured the violations of Section 2. (Pet. App. 131-33.) The revised map did not even comply with the district court's oral opinion. (Pet. App. 96-98.) Nonetheless, on December 27, 1982, the district court adopted the revised map over those objections without any evidentiary hearing. (Pet. App. 137-51.)

D. Appeal to the Seventh Circuit.

The black and Hispanic plaintiffs filed an appeal to the United States Court of Appeals for the Seventh Circuit challenging the adequacy of the map adopted by the district court. Plaintiffs argued that the district court failed to follow established principles of law in considering their voting rights claim and failed to provide a remedy to correct the proven dilution of minority voting strength. The City Council did *not* cross-appeal or in any way contest the finding that it had violated Section 2 of the Voting Rights Act.

On August 14, 1984, the Seventh Circuit issued its opinion, finding that the district court abused its discretion by failing to recognize the full extent of the violation of Section 2 of the Voting Rights Act and failing to provide a remedy that corresponded to the magnitude of the violation. (Pet. App. 1-42.*) The Seventh Circuit held that the map adopted by the district court was inadequate because it did not eliminate the illegal dilution of minority voting strength caused by the City Council map and it did not

* The opinion of the court of appeals, *Ketchum v. Byrne*, was published at 740 F.2d 1398 (7th Cir. 1984).

allow minority citizens a reasonable and fair opportunity to elect candidates of their choice. (Pet. App. 27.) In its opinion, the Seventh Circuit criticized the district court for failing to follow well-accepted principles of redistricting. (Pet. App. 27.) In particular, the Seventh Circuit rejected the district court's approval of manipulation of boundaries to protect incumbencies, examination of retrogression only on a citywide basis, refusal to consider packing, fracturing and boundary manipulation, and the limitation of remedies to a simple majority of voting-age population. (Pet. App. 7, 15-23, 27.)

Because the district court failed to remedy the significant Section 2 violations, the Seventh Circuit remanded the case to the district court for reconsideration of an adequate and appropriate remedy. (Pet. App. 27.) In so doing, the court of appeals set forth certain principles and guidelines for the district court to consider on remand. The Seventh Circuit directed the district court to consider a corrective based on statistical and other data concerning the formation of effective majorities in black and Hispanic wards or to employ some other corrective such as the 65% guideline. (Pet. App. 41.) It directed the district court to consider this corrective because the trial court had failed to consider evidence relating to the appropriate remedy and because the trial court ignored the fracturing of the Hispanic population and the fact that large black majorities existed in certain wards prior to the illegal redistricting.

On September 10, 1984, the Seventh Circuit denied the City Council's petition for a rehearing *en banc*. (Pet. App. 161-62.) All of the judges on the original panel voted to deny the petition for rehearing and none of the members of the court in regular active service requested a vote on the suggestion for rehearing *en banc*. (Pet. App. 162.)

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari raises no important constitutional or statutory issues. Essentially, the court of appeals agreed with respondents that the Section 2 violation was greater than that perceived by the district court and was not properly remedied by the district court. Even in its certiorari petition, the City Council does not challenge the Seventh Circuit's finding that the Section 2 violation was broader than the one defined by the district court.

The petitioner's primary objection, that the court of appeals ignored the factual findings of the district court, overlooks the serious inadequacies in the district court's oral opinion. The petitioner neglects the fundamental legal errors on which the district court's opinion is based, and claims that the court of appeals failed to defer to findings which the district court itself ignored. Despite petitioner's exaggerated claims, the court of appeals did not substitute its judgment for that of the district court. Instead, it remanded the case to the district court for adequate fact-finding.

The petitioner's objections to the Seventh Circuit's discussion of remedy similarly fail to reveal any legal error. The court of appeals simply held that the district court failed to remedy the unlawful dilution of minority voting strength. The court's instructions on remand are consistent with established case law and the intent of Congress as expressed in the legislative history of the recent amendments to the Voting Rights Act.

Additionally, this case is inappropriate for review because it is interlocutory, bound to the specific facts of the redistricting of the City of Chicago, and in complete agreement with the decisions of this Court and other courts.

I.

The Seventh Circuit's Treatment of the District Court's Factual Statements Is Not an Issue Worthy of This Court's Review.

The petitioner's first argument* is that the decision of the court of appeals ignored the requirements of Federal Rule of Civil Procedure 52(a) that factual findings of district courts should not be set aside unless "clearly erroneous." (Pet. 10-15.) There are four reasons why petitioner's assertion is incorrect. First, the district court did not make adequate findings of fact in its oral opinion. Second, the district court's oral statements were premised on fundamental misunderstandings of the applicable law. Third, the district court did not follow its own oral opinion. Fourth, the decision of the court of appeals to remand the case to the district court for reconsideration gives proper deference to the district court's fact finding function.

A. The District Court Did Not Make Adequate Findings Of Fact.

To evaluate the petitioner's argument that the court of appeals ignored the district court's factual findings, this Court should examine the "findings" of the district court. (Pet. App. 43-71.) In its oral opinion delivered extemporaneously from the bench, the district court failed to make adequate factual findings. The district court did not reveal what evidence in the extensive record supported its conclusions, did not refute or even discuss contrary evidence, and did not make any findings about the racial and ethnic composition of the City of Chicago.

The petitioner's claim that the court of appeals rejected the district court's factual findings ignores the fact that

* The petition sets forth five "questions presented" which are duplicative and confusing. We shall attempt to answer those questions as we respond to petitioner's three purported "reasons for granting the writ."

the district court failed to make complete and adequate findings. For example, petitioner contends that "only evidence relating to what was happening in terms of registration and turnout in the representative minority wards" was relevant to the remedial issues. (Pet. 10-11.) In ordering its remedy, however, the district court did not recite any facts about minority voting strength in "representative minority wards," in aldermanic elections, or even about actual registration and turnout in the City as a whole. Instead, the district court rendered its decision in broad and conclusory terms.

Although petitioner argues that the court of appeals ignored the district court's findings, petitioner relies not on the district court's findings but instead refers frequently to matters in the record about which the district court's opinion was silent. (*See, e.g.*, Pet. 12, 13, 26, 28.) The district court apparently thought more detailed findings were unnecessary, for it rejected respondents' suggestion that the parties submit proposed findings of fact. (Tr. 3295-99.) Given that the district court did not make adequate findings of fact, petitioner's claim that the court of appeals erred in not deferring to the district court does not raise an issue deserving of this Court's attention.

B. The District Court's Conclusions Were Based On An Erroneous Understanding Of The Law.

Even if the district court had made formal findings of fact, the court of appeals was not required to give deference to the district court's conclusions because of the district court's profound misunderstanding of Section 2 of the Voting Rights Act. The clearly erroneous standard of Rule 52 does not require a court of appeals to defer to factual findings based on incorrect statements of law. *See Kelley v. Southern Pacific Co.*, 419 U.S. 318, 322-23 (1974).

The district court committed fundamental legal errors. As noted above, at 10-11, the district court failed to appreciate Congress' intent that Section 2 apply to the redistricting process and failed to understand that dilution of voting strength is one of the primary evils addressed by Section 2.

The court of appeals ruled that the district court erred when it concluded that manipulation of ward boundaries to dilute the voting influence of tremendous numbers of minority voters was not relevant to the Voting Rights Act so long as on a citywide basis minority voters were represented in a way which the trial court found satisfied its own standards of "fairness." (Pet. App. 14; 18-19.)* In addition, the district court misinterpreted the "totality of the circumstances" test established by the 1982 amendments to Section 2 by ruling that this test simply raises the level of generality of the court's inquiry to the entire political unit. Instead of considering whether individual wards were drawn in order to limit minority voting strength and protect white incumbents, the district court stated "the violations have to be shown to exist because of defects, if any, in the redistricting plan when it is looked at as a whole, over the city's 50 wards in a totality." (Pet. App. 56.)

The decisions of this Court and other courts have rejected the position of the district court that specific ward manipulations are not relevant to violations of the Voting Rights Act. See, e.g., *United Jewish Organizations v. Carey*, 430 U.S. 144, 165 (1977) (the Court analyzed the

* Though the court of appeals found it unnecessary to decide whether there was intentional discrimination, its discussion of this subject makes clear that the court of appeals disagreed profoundly with the district court's conclusion that fracturing, packing and the manipulation of ward boundaries are irrelevant to either Section 2 or intentional discrimination analyses. (Pet. App. 15-23.)

effect of redistricting plan on specific groups); *Wright v. Rockefeller*, 376 U.S. 52, 56 (1964) (issue was whether lines of specific congressional districts were drawn on racial grounds); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 141-42 (5th Cir.) (*en banc*), cert. denied, 434 U.S. 968 (1977) (slicing up of a certain compact minority); *Robinson v. Commissioners Court*, 505 F.2d 674, 678 (5th Cir. 1974) (complaint that division of precincts diluted minority strength).

The Seventh Circuit criticized the district court for ignoring the manipulation of particular ward boundaries, observing that prior courts had found that "evidence of dilution of minority strength by manipulation, fracturing and packing established intentional racial discrimination" (Pet. App. 19.) The court found that "[i]n a case where lines are drawn to establish discrete electoral units and to distribute racial and ethnic populations among districts, the ways in which these lines are drawn may become independent indicia of discriminatory intent or result." (Pet. App. 13.)

The district court also erred in concluding that the decision of an alderman to remove citizens from his ward solely on racial grounds was not relevant to the Voting Rights Act. The Seventh Circuit noted that "[s]ince it is frequently impossible to preserve white incumbencies amid a high black-percentage population without gerrymandering to limit black representation, it seems to follow that many devices employed to preserve incumbencies are necessarily racially discriminatory." (Pet. App. 19.)

The district court's remedial conclusions, therefore, were based on its fundamentally erroneous view of Section 2. The district court only imposed a remedy to cure the citywide retrogression which it found was the sole violation of the

law. It was not error for the Seventh Circuit, operating with a correct understanding of the law, to charge the district court on remand to consider those measures necessary to achieve effective participation on a ward-by-ward basis. The Seventh Circuit did not reject the district court's factual conclusions. It simply required the district court on remand to properly remedy the Section 2 violation.

C. The District Court Failed To Implement Its Own Conclusions.

The petitioner accuses the court of appeals of failing to accept the district court's factual conclusions. The district court, however, failed itself to adhere to its own directives in approving a remedy in at least two of the City's Hispanic wards.

For example, consider the city's 32nd ward. In its oral opinion (Pet. App. 65) the district court found that "on voting age statistics [the Hispanic population was] reduced to a 40 percent minority compared to a 54 percent white majority. I think that percentage should be reversed. I would so order a change in the demographic complexion of the 32nd Ward." Despite concluding that a 54% Hispanic voting-age population was required, the district court approved a map with a 38.8% voting-age Hispanic population in the 32nd ward, which is actually a reduction from the 39.59% Hispanic voting-age population provided the 32nd ward in the illegal City Council map. (See Pet. App. 26.)

In addition, the district court announced that the 26th ward was to have a 55% Hispanic population in order "to accommodate the fact that many of them [Mexican residents of the ward] are not citizens and haven't had a chance

to become citizens." (Pet. App. 65.) The court-approved map, however, provided for only a 50.0% Hispanic voting age population.*

The district court's failure to put in place the remedy it ordered violates the holding of this Court that once a court seeks to remedy a violation, "it will be held to stricter standards in accomplishing its task than will a . . . legislature." *Connor v. Finch*, 431 U.S. 407, 414 (1977). In this case, the court-approved plan, which was not the product of legislative deliberation, failed to accomplish even the remedial task that the district court identified. The court of appeals recognized this error in the court-approved map (Pet. App. 26), and remanded the case to the district court for correction.

D. The Decision of the Court of Appeals Properly Recognizes the District Court's Fact Finding Function.

The Seventh Circuit did not substitute its conclusions for adequate factual findings of the district court. Instead its opinion remanded the case back to the district court, reinforcing the substantial freedom of the district courts to devise remedies for violations of the Voting Rights Act. The court of appeals noted, quoting language of this Court, that the task of a court of appeals is to determine whether the lower court properly exercised its "equitable discretion" in devising remedies consistent with both the Constitution and the state's electoral policy. (Pet.

* The district court's opinion called on the City Council's attorneys to prepare a new map. They did so, without any action of the City Council. They presented the map to the district court and claimed that compliance with the court's order was not feasible. (Pet. App. 80-81.) The court accepted the map without modifying its prior analysis or reasoning (Pet. App. 126-27), despite the fact that the plaintiffs were able to prepare a map which more closely met the judge's specifications. (Pet. App. 85, 121.)

App. 27, quoting *Connor v. Finch*, 431 U.S. 407, 414 (1977).)

After concluding that the district court failed to consider all of the factors relevant to the determination of a remedy and that the district court based its finding on incorrect legal assumptions, the court returned the case to the district court for it to complete its task. It recognized that it is not "the proper role of this court to formulate its own redistricting plan or to dictate to a district court minute details of how such a plan should be devised." (Pet. App. 28.) The petitioner's claim that the court of appeals improperly reviewed the district court is therefore unfounded.

II.

The Seventh Circuit's Remand Guidelines Do Not Warrant Review By This Court.

The court of appeals concluded that the map approved by the district court failed to remedy the City Council's violation of the Voting Rights Act (Pet. App. 27) and remanded the case to the district court to fully remedy the violation. Try as it might to create an important legal issue to attract this Court's attention, petitioner has been unable to do so. Instead, petitioner persists in arguing that the Seventh Circuit has imposed a super-majority 65% rule as a rule of law for application on remand. The court of appeals, however, did not prescribe any remedy, but set forth certain "guidelines to assist the district court in determining a suitable remedy." (Pet. App. 28.)

Petitioner makes two more general objections to the remedial guidelines of the court of appeals. First, petitioner claims that the court of appeals ignored the *Zimmer-White* factors in reversing the district court. (Pet. 15-21.) Second, petitioner asserts that the court of appeals erred

by reversing the district court because the district court's remedy "fairly reflects the political strength of the minority community." (Pet. 21-29.)

Neither of these arguments is correct and they do not merit this Court's attention. In this section we will show that the remedial discussion of the court of appeals was correct, the *Zimmer-White* factors are not directly relevant to the issue of remedy in this case, and the Seventh Circuit's instructions on remand did not—as petitioner puts it—"maximize" the power of minority voters in the City of Chicago.

A. The Seventh Circuit's Discussion of the Remedy for a Voting Rights Act Violation Is Correct.

The report of the Senate which adopted the 1982 amendments to the Voting Rights Act stated that in remedying a violation

[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S. Rep. No. 417, 97th Cong. 2d Sess. 31, reprinted in 1982 U.S. Code Cong. & Ad. News 208. This Court has established the same rule, holding that "the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).

In this case the district court held that the City Council map illegally diluted the voting strength of the City's minority residents. Before redistricting, there were 19 strong black majority wards, while after redistricting

there were 17 weaker black majority wards. Although the number of Hispanic wards remained the same, the City Council map weakened the voting strength of Hispanics within those wards by fracturing the Hispanic population. At the same time, no white majority wards were changed to white minority wards nor was a clear white majority reduced to a near-majority or plurality.

The court of appeals found that by only restoring bare voting-age majorities, the district court failed to completely remedy the prior dilution of minority voting strength caused by the City Council's map. Even if the only violation of Section 2 had been the citywide retrogression accomplished by the reduction of the number of black majority wards from 19 to 17 (which it was not), the district court's map did not remedy that violation. (Pet. App. 27.) The court-approved plan only increased the minority voting-age populations in the 15th and 37th wards to 52.6% and 56.2%, respectively, far below their preredistricting levels of 60.0% and 72.4%, respectively. The Seventh Circuit instructed the district court on remand to consider the preredistricting population statistics in creating an appropriate remedy for the Section 2 violation. In the context of discussing the 65% guideline or some other corrective, the court observed that

if the original majority is not restored, then the most relevant change is one *downward* from the preredistricting percentage rather than one *upward* from the map formulated by the City Council action, which was found to be in violation of the Voting Rights Act.

(Pet. 31.) The court of appeals also noted that on remand the district court must consider a proper remedy for the fracturing of the Hispanic communities that was not cured by the map adopted by the district court. (Pet. App. 41 n.25.)

In sum, the court of appeals reversed the district court because it followed precisely the wrong approach. Rather

than seeking to eliminate the dilution of minority voting strength, the district court declared that its new map should make as few changes as possible from the City Council map. (Pet. App. 62.)

B. The Court of Appeals Did Not Err by Failing to Discuss the *Zimmer-White* Factors as a Part of the Remand Guidelines.

The 1982 amendments to the Voting Rights Act replaced the discriminatory intent test of *City of Mobile v. Bolden*, 446 U.S. 55 (1980) with the "results" test previously advanced in *White v. Regester*, 412 U.S. 755 (1973). In order to guide the courts in applying this results test, the Senate Report outlined some factors a court could consider in determining whether a challenged practice violated Section 2. These factors, the so-called *Zimmer-White* factors,* describe some objective measures of minority participation in the political process. The Seventh Circuit recognized the relevance of these factors to the determination of liability under the Voting Rights Act and quoted them in full. (Pet. App. 10-12 & n.5.)

The petitioner asserts that the court of appeals erred by not considering these factors in its discussion of remedy. (Pet. 15-21.) While petitioner assumes the relevance of these factors to the choice of a remedy, the Senate Report and the decisions in *White* and *Zimmer* discuss the factors as relevant only to liability. The Senate Report is quite explicit. A court is to ask whether "to establish a violation, plaintiffs could show a variety of fac-

* The factors are taken from this Court's *White v. Regester* decision and from the Fifth Circuit's *en banc* opinion in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds, sub nom., East Carroll Parish School Board v. Marshall*, 424 U.S. 636 (1974). As the Seventh Circuit correctly noted, these factors are not exclusive and are simply among a variety of matters courts may consider in reviewing Section 2 allegations. (Pet. App. 10 n.5.)

tors, depending on the kind of rule, practice, or procedure called into question." S. Rep. No. 417, 97th Cong. 2d Sess. 28-29 (1982) (emphasis added), reprinted in 1982 U.S. Code Cong. & Ad. News 206-07. Here, liability is unquestioned. Consequently, petitioner's attempt to assign error to the court of appeal's failure to apply the *Zimmer-White* factors in its discussion of the appropriate remedial guidelines is simply misplaced.

C. The Seventh Circuit's Remand Guidelines Do Not Overstate Minority Strength.

Petitioner's final argument is that the Seventh Circuit erred because the district court's map accurately reflected minority voting strength in Chicago. (Pet. 21-28.) Petitioner compares existing minority population to the district court plan and concludes that the district court plan accurately reflected the strength of the minority population. Petitioner also argues that the Seventh Circuit's discussion of a "corrective" evidences its intent to require the district court on remand to overrepresent minorities in the City of Chicago.

Petitioner is wrong in its characterization of the Seventh Circuit's decision. The court of appeals held that the district court failed to remedy what no party contests was an illegal dilution of minority voting strength. The district court "remedy" continued in effect the dilution of pre-redistricting minority voting strength. Following its conclusion that the district court had not remedied the Section 2 violation, the court of appeals set forth certain principles to be considered as guidelines by the district court on remand in fashioning appropriate relief.

The first principle the court discussed was the need for the district court to consider a corrective to allow effective minority participation. The court observed that because minority populations tend to be younger, often

do not register to vote, and have lower turnout figures, if the court does not restore minority strength to its pre-violation level it should endeavor to form wards with minority strength in excess of a simple majority to make voting power effective. (Pet. App. 31-32.) The court of appeals noted that the Department of Justice and many courts have endorsed the use of a goal of 65% minority population in minority wards. (Pet. App. 33.)

The court refused, however, to mandate the use of any particular figure on remand. It noted that to do so would be "too inflexible to the practical needs of redistricting." (Pet. App. 31.) The court concluded that the district court had not carefully considered these factors and that on remand the district court should examine the "emerging changes in sociological and electoral characteristics of minority groups and broad changes in political attitudes [which] may substantially alter, or eliminate, the need for a corrective." (Pet. App. 36.) The use of a corrective such as the 65% Department of Justice guideline, the court noted, "might be fairly viewed as a limitation on restoration of the pre-redistricting black majorities." (Pet. App. 37.) It was not viewed as a means to maximize minority strength, but as a "fair antidote to retrogression." (Pet. App. 37.)

The second guideline the court discussed related to the City's Hispanic wards. (Pet. App. 32-34.) The court suggested that on remand the district court consider the effect of the fact that many Hispanic residents of Chicago are not citizens and are therefore not able to vote. To assure fair representation of Hispanic citizens, the Seventh Circuit stated that the district court could consider whether some wards should be analyzed on the basis of the number of individuals eligible to vote. (Pet. App. 32-33.)

This suggestion had been adopted by the district court (Pet. App. 65), but was not implemented by the court when it approved the Council's attorneys' attempt to remedy the Section 2 violation. The use of citizenship figures is consistent with the accepted use of voting age statistics. Both focus on the actual voting strength of minority groups. It was not error for the court of appeals to suggest that the district court again consider these matters on remand.

The central concern of the court of appeals was to correct the dilution of minority voting strength which went uncorrected by the district court. It reversed the ~~district~~ court for its failure to do so and instructed the ~~district~~ court not to commit the same errors on remand. The petitioner does not challenge the Seventh Circuit's legal conclusion that the Section 2 violation was greater than perceived by the district court; its factual objections are best saved for the district court to consider on remand.

III.

The Seventh Circuit's Decision Is Inappropriate For Review.

Certiorari review in this case is inappropriate because the decision of the court of appeals is interlocutory, fact-bound, and consistent with the decisions of this Court and the other circuit courts.

A. The Seventh Circuit's Decision Is Interlocutory.

The writ should be denied because the decision below is interlocutory. It remands the case to the district court with instructions to remedy the violations previously identified. It does not commit the district court on remand to a particular result. It only instructs the district court

to consider the issues the court of appeals held were not properly resolved.

This court should follow its ordinary practice not "to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville, Tampa and Key West Railway*, 148 U.S. 372, 384 (1892). See *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) ("normal practice of denying interlocutory review"); *Brotherhood of Locomotive Firemen v. Bangor & Aroostook Railroad*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); R. Stern & E. Gressman, *Supreme Court Practice* 300 (5th ed. 1978).

This case does not present the exceptional circumstances needed to justify abandoning this practice. Because the decision of the court of appeals does not bind the district court to a particular result on remand, it is far better to allow the district court to act than to review the incomplete actions of the lower courts.

B. The Seventh Circuit's Decision Is Fact-Bound.

Supreme Court review is also inappropriate in this case because the decision of the court of appeals applies to the particular facts of the redistricting of Chicago. This Court has noted that devising a remedy for a violation of Section 5 of the Voting Rights Act depends on "the nuances of the situation." *Perkins v. Matthews*, 400 U.S. 379, 397 (1971). Similarly, the holding of the court under Section 2 of the Voting Rights Act in this case relates particularly to the wards of the City of Chicago. As the detailed factual analysis in the court of appeals' decision demon-

strates, the issues which occupied the court's attention were the illegal retrogression, the manipulation of specific ward boundaries, the fracturing of black and Hispanic communities, and the need to consider appropriate remedies tailored to these problems.

Even the question of a corrective—the statement in the Seventh Circuit opinion which the petitioner most criticizes—relates only to the facts of *this* case. The witnesses in the case, including Kimball Brace, the petitioner's expert, noted that with respect to the City of Chicago 65% was a reasonable benchmark for effective minority participation. (Tr. at 3665-66.) Additionally, evidence in this case indicated that the Chicago Democratic Party would not endorse a minority candidate for a ward position until the ward's minority population greatly exceeded 50% of voting age population. (Tr. at 2206.) This is highly probative evidence of the problems of effective minority participation in the City of Chicago, given that in the City the endorsement of the Democratic Party is often tantamount to election. *Rybicki v. State Board of Elections*, 574 F. Supp. 1082, 1114 (N.D. Ill. 1982) (three-judge court). Additionally, the Seventh Circuit's opinion does not mandate the use of a specific corrective; it only states that in attempting to fully remedy the unlawful dilution of minority voting strength, it is an option the district court should consider.

C. The Seventh Circuit's Decision Is Not In Conflict With Any Prior Judicial Decision.

The decision of the court of appeals is inappropriate for review because it does not advance any statements of law inconsistent with the decisions of this or any other court. The petition proclaims that the Seventh Circuit's decision is "inconsistent with prior decisions of this Court" (Pet. 8), yet it identifies no decisions which compel a result different than that of the court of appeals. Its only legal

argument, that the Seventh Circuit misapprehended its role and applied a standard of review which was not properly deferential, neglects the factual and legal errors committed by the district court. Were this Court to review this case it would become embroiled in complex factual issues better left to the expertise of the district court. The Seventh Circuit properly decided to remand the matter to the district court. No legal issue compels review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

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